

**Testimony of  
Alva J. Hopkins III, Chairman  
Government Affairs Committee  
Forest Landowners Association**

September 7, 2005  
10:00 A.M.  
1300 Longworth Building  
U.S. House of Representatives

Kelo vs. New London: Implications for Non-Industrial Private Forest Landowners

Presented To The  
Committee on Agriculture

**STRENGTHENING THE OWNERSHIP OF PRIVATE PROPERTY ACT OF 2005**

**EMINENT DOMAIN AND PROPERTY PRIVATE RIGHTS:  
AN OPPORTUNITY TO ADDRESS A DECADES-LONG CONCERN**

*“The rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted.”*

James Madison  
Speech at the Virginia Convention, 1829

Chairman Goodlatte, Ranking Member Peterson, Members of the Committee, thank you for the opportunity to appear before you today to speak on the implications of the Supreme Court decision, *Kelo v. New London*. More specifically, the implications and opportunities non-industrial private forest landowners see for statute refinement and clarification in the wake of that decision. Many of you have spent a lot of time on this issue and we in the forestry community appreciate it.

I am Alva J. Hopkins, III, a forest landowner from Folkston, Georgia, and a Board Member and Chair of the Governmental Affairs Committee of the Forest Landowners Association. I received a Juris Doctorate Degree from Mercer University and practiced law for eleven years, closing my practice in 1989 to manage timberlands owned by several families, including my own.

I don't know of any U. S. Supreme Court decision that had a more devastating effect on private property rights than *Kelo v. City of New London*. The Fifth Amendment of the United States Constitution provides in part "nor shall private property be taken for public use without just compensation." The Supreme Court has taken the words "public use" and replaced it with their new language "public purpose." What's next? Public benefit? Justice O'Connor states in the dissenting opinion that the court is expanding the meaning of the word public use. She states the decision "holds that the sovereign may take private property currently put to ordinary private use and give it over for new, ordinary private use, so that new use is predicated to generate some secondary benefit for the public – such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public thus if predicated (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on imminent domain power." Dissenting opinion, *Kelo v. City of New London*.

As forest landowners, the management of our forestland confers numerous benefits on the public. Some of these benefits include producing millions of tons of oxygen; sequestering carbon; filtering air and water; providing fish and wildlife habitat, including that for threatened and endangered species; improving the aesthetic beauty of the natural landscape; and providing opportunities for recreation and solitude, just to name a few. Under the *Kelo* case, a governmental entity can come in and condemn thousands of acres of forestland, not only to convey it to another private landowner who will put it to a 'higher use,' but to one who wishes to create a park. Perhaps this park

even joins a residential development of this same private landowner, and perhaps the new park would enhance the residential development, and meet the public purpose requirement by providing many of the above-listed benefits to the public. Legislation is desperately needed to strengthen private property rights back to the originally intended constitutional level and put a halt to their continued deterioration.

Forest and farmland would be considered low-end use property as compared to commercial property with regard to the creation of tax revenue and jobs. Therefore, farm and timberland would never withstand an eminent domain attack by any governmental entity wherein the new private landowner will create a new job or build a structure on the property that will increase the tax base.

At the time our country was founded, the inalienable right for individual citizens to own and manage property was set with the cornerstone of our new democracy. Without a commitment to this fundamental freedom, the United States of America would have simply accepted the tradition of powerful landowners and continued indentured servitude in this new nation, or a socialist government such as Russia or China, and we would now live and work under a set of rules of law from which our ancestors sought freedom. Are the freedoms that this country was founded on and so many brave men and women have died to protect in real danger? If so what can be done to protect our rights?

For a forest landowner, the ability to manage on a long-term investment strategy is vital to the future of the industry. This long-term investment for landowners has upfront investment costs, together with annual taxes and other management costs, with the first return on the property occurring usually in 12 to 18 years with possible liquidation of

the initial investment in 25 to 35 years. For landowners to make this type of commitment, private property rights must be fully protected.

When the constitution was framed by our founding fathers, it was their intent to protect private property, except when absolutely necessary for public use. Public use was intended for such things as roads, hospitals, and furtherance of government functions. It was never intended to provide a system for preference of one private landowner over another. Unfortunately, with the urbanization of America and the corresponding disconnect many citizens and their delegates have with the land, we see a reduction in respect and understanding that this basic right holds in the structural essence of our nation. Most persons don't understand the commitment that a forest landowner makes when he/she plants a tree, knowing full well that he/she may not live long enough to see it harvested.

We have seen in this country the constant erosion of private property rights through a number of sources. Property is not a singular concept. It is not just a matter of title, but of a whole 'bundle of rights.' Property law recognizes these bundle rights and likens property to a bundle of sticks, any one of which could be bought, sold, rendered, or bequeathed other than through a taking. Our rights include the right to acquire property, dispose of property, exclude others the right against trespass, the right to quiet enjoyment, use rental, and most importantly, the right to active use so long as it does not hinder the rights of others in turn to enjoy the use of their property. In contrast, our 'taking laws' are based on the idea that the entire bundle must be taken before the government must pay compensation. But, take away any one of these rights and you reduce the value of the property to the owner. This all or nothing view enables government to curtail land

uses through regulation that can actually squeeze the value out of the property a little at a time, and allows an escape from any compensation to be paid to the owner.

Many laws whose intentions are good, such as the Clean Water Act, the Endangered Species Act, and the unintended consequences of the magnificent success of tree-planting through the Conservation Reserve Program, include disincentives for forestland investment. As these disincentives build, many forest landowners are changing their investment strategy and selling their properties to place their capital in other types of investments. We have learned that the currently over 10 million forest landowners in the United States who own property for a number of different reasons (*i.e.*, recreational investment, annual income production, hunting and fishing), the vast majority will sooner or later harvest some of the timber on their property. As can be seen by some of the examples above, these partial takings can be as serious a problem as a full taking, especially when the partial taking first occurs. The owner may subsequently be paid “just compensation” for the full taking, however, that just compensation is considerably less than it would have been had it not been for the previously occurring partial taking.

The members of this committee have shown in the recent past, with the passage of the Healthy Forest Restoration Act, and are showing here today, by having hearings with regard to the impact of the *Kelo* decision, that private property rights are vital to the continued freedom of this country. Soon you will also have the opportunity to address this issue with the reauthorization of the Endangered Species Act. Here today, we have the opportunity to re-establish the primacy of private property rights in the United States. The *Kelo* decision has brought front and center the issue of private property rights. Now

is the time to include in this legislation language that will truly strengthen the ownership of private property. If a governmental entity prevented an individual from using a portion of their home and even further required them to maintain that portion of the home they could no longer use, would this constitute a taking? Of course, it would only be a partial taking and as such the individual would receive no compensation since they would be allowed to use the remainder of their home. As is easily seen, in this little example, this simply is wrong. Compensation should be required whether the government makes a full or partial taking.

As previously mentioned, well-intended legislation - such as the Endangered Species Act, the Clean Water Act, and others – can have unintended consequences, examples of which restrict the use of property deemed critical to survival of listed plants and animals, or to promote and protect clean water or similar high-minded endeavors. All of these are well-intended laws that seek to remedy serious problems facing our country. Private landowners and the businesses associated with them are in favor of saving at-risk species, preserving clean water, and conserving our natural heritage. We know that societal goals and private property rights can certainly be compatible, but if society as a whole benefits, then society as a whole must pay the bill. Sadly, Congress and the Courts have eroded private property rights in a misguided approach to secure public benefits. However, during this same time, little attention has been given to the cost / benefit of these actions, and those most affected by the subject regulations have seldom been a part of the process. In the future, regulations that are not cost-beneficial must be rethought, and the fundamental rule of law that rights cannot be taken without compensation reaffirmed. In the *Kelo* case we have a narrow-majority opinion (5-4) that

has simply gone too far. As Justice O'Connor so aptly stated, "Nothing is to prevent the state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory. As a result of the *Kelo* decision, almost any piece of property is now subject to condemnation." Most governmental entities view forestland as one of the lowest uses of property, and almost any other use would be considered a higher and better use producing more taxes and potential jobs. The taking clause of the Fifth Amendment of the Constitution was intended to reflect a limitation on eminent domain, not a carte blanc grant of power rendering virtually any and every piece of private property subject to eminent domain.

The intent of my testimony to you here today has been to try to focus on the adverse impact of the *Kelo* decision on forest landowners as well as briefly touch on several other private property issues. These problems have been collectively labeled the South's invisible forest health problem. There can be no better time than the present to enact the 'Strengthening the Ownership of Private Property Act of 2005'. I hope that this committee will address the private property rights issues that I have focused upon today and restore private property rights back to their constitutionally-intended place. Mr. Chairman, this concludes my remarks. I would be glad to respond to any questions that any member of the committee may have.